PETITIONER'S REPLY BRIEF TO BRIEF FOR RESPONDENTS HENNIGAN AND JOHNSON IN OPPOSITION.

Respondents' brief sets out reasons why the petition for Writ of Certiorari should be denied requiring a refutation of such reasons to be dealt with in the same format as they appear in such brief.

"1. There Is No Lack of Jurisdiction and No Conflict With Any Other Decision of the Third Circuit."

Respondents cite portions of the opinion in *McSparran v. Weist,* No. 16793 (3 CCA, 1968) (17-18ad) which are the very bases giving rise to the conflict between the *McSparran* decision and the decision in *Van Der Schelling v. U. S. News and World Report, Inc.,* 213 F. Supp. 756 (1963), affirmed per curiam, 324 F. 2d 956, cert. denied, 377 U. S. 960, both conflicting opinions appearing within the Third Circuit.[1]

In the Johnson case, presently before the court, diversity of citizenship was artificially manufactured by the appointment of a nonresident administrator of the Estate of ROBERT C. WILSON, deceased. The *McSparran* and *Esposito*[2] decisions deal with this precise issue, and hold that diversity created in this manner is violative of 28 U. S. C. A. 1359. Hence, the holding in *McSparran* and *Esposito* is related to *Johnson.*

In *Van Der Schelling,* the court inquired whether diversity of citizenship existed and found to the contrary. Moreover, in that case the Statute of Limitations had ruled out a new action in the state court. However, the opinion of the district court clearly stated that despite the unfortunate result, the court was powerless to confer jurisdiction.

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1. The same conflict was raised in *Kramer v. Caribbean Mills, Inc.,* 392 F. 2d 387 (1968); cert. granted by the Supreme Court of the United States, October Term, 1967, No. 1494.

2. *Esposito v. Emery,* No. 16671 (3 CCA, 1968).

Respondents question Petitioner's defense of immunity which they refer to as "some sort of immunity". The name of the petitioner will clearly reveal to this court that it is the well known doctrine of sovereign immunity which is involved herein. Furthermore, all of the cases cited by Respondents, in their discussion of immunity, deal with the doctrine of control over employees rather than immunity.

"2. There Is No Conflict With Any Applicable Pennsylvania Law.

(a) The Pipeline Act."

With respect to the allegations of respondents that there was no evidence that the petroleum products involved in the incident in question were Atlantic's, and that the Pipeline Act of Pennsylvania has no application, we cite the following facts of record which will negate their assertions. WILLIAM J. WAKELEY, Superintendent of Plant Production Division, Atlantic Richfield Company testified (1942a):

"Q. Well, you were satisfied these were your petroleum products?

A. I was?

Q. Yes, sir.

A. I never said that, sir.

Q. Are you?

A. I don't deny that some of them *had* to be.

Q. Well, are you, sir? Let me put it that way.

A. No, sir. I can't deny that some of them are ours, and how much, I don't know.

Q. Well, it is only a question of quantity. Some of them are yours; is that correct?

A. That's right. *I can't deny that, sir.*

Q. Right. So some of these that were being pumped out and separated were Atlantic's.

A. I can't disagree with that . . ." (2050a) (Emphasis ours.)

Furthermore, in Respondent Atlantic's Answers to Requests for Admissions by Plaintiff in Civil Action No. 33306, one of the three cases presently before this Court, the following appear:

> "3. Answering defendant admits that there have been occasional leaks from pipes in the refinery located in South Philadelphia belonging to the Atlantic Refining Company . . ."
>
> "4. Answering defendant admits that there have been occasional leaks from the pipes in the refinery referred to in Answer No. 3 above . . ."
>
> "6. Answering defendant admits that there have been occasional leaks from pipes in the refinery located in South Philadelphia belonging to the Atlantic Refining Company; that liquid petroleum products have seeped into the ground, and that petroleum products have been found on the water table . . ."[3]

It is to be further pointed out that since there are other tank farms in the area where the accident in this case occurred, although the work was being conducted immediately adjacent to the Atlantic Refining Company's tank farm, in order to remove any question that the petroleum products found at the water table at the tunnel where the accident occurred were products of Atlantic, Mr. Wakeley admits that the next nearest tank farm from Atlantic was about one half to one mile away.[4]

With respect to Respondent's denial of the application of the Pipeline Act of Pennsylvania, we refer to the aforementioned Answers to Requests for Admissions,[5] where the following admission is to be found:

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3. Joint Appendix in the United States Court of Appeals for the 3rd Circuit, Volume 1, pages 231a and 232a.

4. Joint Appendix, Volume 6, pp. 1961a and 1962a.

5. See 3, *supra*.

> "7. Regardless of the meaning of 'tank farm', answering defendant admits that the pipe lines were laid by employees of the Atlantic Refining Company or at the direction of employees of the Atlantic Refining Company."

The explicit language of the Pipeline Act clearly establishing its application to the facts in this case is set forth in the petition for Writ of Certiorari at pages 14 and 15.

"(b) Control"

In answer to the argument found in Respondents' brief reference is made to Petitioner's argument as outlined in its Petition for Writ of Certiorari. Page 17 et seq.

"(c) Punitive Damages"

The Respondents emphatically and inaccurately state that the issue of punitive damages was never raised by the Petitioner in the lower court. It is incredible to believe that Respondents are naive enough to hope that this bold statement is true. This issue was raised by Petitioner as question No. 2 in "Questions Involved" in its brief in the lower court. To make certain that there could be no question that this issue was being raised, the words "compensatory" and "punitive damages" were printed in italics.

Other places in the record where the issue was raised can be found at page 38 of Petitioner's brief in the lower court as well as in Petitioner's Reply brief in the same court at pages 9 and 10, and in the Petition for Rehearing at Page 7.

CONCLUSION.

In conclusion, Respondents' allegation that the Constitution of the United States is involved not at all need not be dignified by an answer. Since no legally sufficient reasons for the refusal to grant the prayer of the petition can be found in Respondents' brief, it is respectfully requested that this is a case for the granting of Certiorari for the reasons set forth in the Petition for a Writ of Certiorari.

Respectfully submitted,

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